IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1566 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No. : NO

2. To be referred to the Reporter or not? Yes. :

3. Whether Their Lordships wish to see the fair copy of the judgement? No. : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No. : NO

5. Whether it is to be circulated to the Civil Judge? No. : NO

COSMOS DEVELOPMENT CORPORATION

Versus

AHMED ALI MIRSAHEBMIYA SAIYED

Appearance:

MR VIMAL M PATEL for Petitioner

MR SK BUKHARI for Respondent No. 1

MR AB MUNSHI for Respondent No. 2 to 4.

MR PK JANI for Respondent No. 5

MR BG PATEL for Respondent No. 6 and 7,.

RULE SERVED BY DS for Respondent No. 8

MR MC BHATT for Respondent No. 11

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 02/08/2000

ORAL JUDGEMENT

This revision application has been filed against

the order dated 30-9-1999 passed by the Judge, City Civil Court, Court No. 19, Ahmedabad, whereby the application exh. 71 moved by the respondent no. 1 in City Civil Suit No. 5882/97 has been allowed and the plaintiff is directed to produce the original agreement to sell dated 17-5-1980, before the Court on 6-10-1999.

2. The suit has been filed by the petitioner for specific performance of the contract on the basis of the agreement to sell dated 17-5-1980. It is admitted that the agreement to sell in question is an unregistered document. The respondent no.1 sent notice dated 29-12-1997 to the plaintiff to make the original agreement to sell available for inspection and the plaintiff has not given any reply to the said notice. Thereafter, the plaintiff's witness was being examined and examination-in-chief of his witness has already over. The respondent no. 1 moved the application exh. 71 on 15-4-1991 under O. 11 R. 14 of the C.P.C. to produce the original agreement to sell before the Court. During pendency of the application the petitioner also gave notice dated 16-9-1999 to the respondent no.1 to produce the agreement to sell. After hearing the parties, the Court below came to the conclusion that the agreement to sell was in possession of the petitioner and hence the application dated 15-4-1999 exh. 71 has been allowed by the order dated 30-9-1999 directing the petitioner to produce the original agreement to sell executed by Mirsahebmiya Hamirmiya Saiyad father of the respondents no. 2 to 7. This order has been challenged in the present revision application.

3. Learned counsel for the petitioner contended that the Court below has committed an error in holding that the original document agreement to sell is in possession of the petitioner. At the most the trial Court ought to have dismissed the application exh.. 71 on basis of the assertion made by the petitioner that the agreement to sell is not in custody of the petitioner. The suit might have been dismissed on the ground that the original document is not produced and as for production of secondary evidence he has not made any application. He has further contended that the inquiry and adjudication of the application under O. 11 R. 14 of the CPC is not contemplated in respect of possession of the original document particularly looking to the scheme of Order 11 Rules 12, 13 and 14 of the CPC. The order can only be passed if the possession of the document is admitted, then the party can be directed to produce the document. Unless, admission of possession of the document is there, the Court has no jurisdiction to pass any order for

production of original document before the Court. The party can object for production of document by way of filing the affidavit in Form No. V of O.11 R. 13 of the CPC. In case, the petitioner says that he is not in possession of the original document, the Court has no jurisdiction to pass the impugned order directing him to produce the document before the Court. As such, the Court below has acted illegally and exceeded its jurisdiction directing the plaintiff to produce the original document.

4. The next contention of the learned counsel for the petitioner is that the Court has discretion under O. 11 R. 14 of the CPC and the same should be exercised at appropriate time and not at the time when the respondent No. 1 asked for. At the most, in case the disputed original document is not relied on or is not filed by the plaintiff, the suit could have been dismissed. But the Court ought not to have exercised its jurisdiction under O. 11 R.14 of the CPC holding that the petitioner is in possession of the original document and directing the petitioner plaintiff to produce the original document before the Court.

5. The next contention of the learned counsel for the petitioner is that the plaintiff has substantial right to adduce secondary evidence u/s 65 (a) of the Evidence Act. In case the Court finds that the document does not appear to be in possession of the party concerned, the Court can allow the party concerned to produce other document or to lead secondary evidence. That right of party cannot be curtailed by the procedural law under the provisions of the Civil Procedure Code. The Court below misconceived the application and misinterpreted the Statute and hence the impugned order is liable to be quashed and set aside. Though it is also argued by the learned counsel for the petitioner that regarding the possession of the document summary procedure has been adopted on the basis of the affidavits the issue has been decided which is against the provisions of law.

6. On the contrary, learned counsel for the respondent no. 1 contended that the petitioner has filed the list of documents along with the plaint wherein at Sr. No. 1 xerox copy of the agreement to sell allegedly executed by the deceased Mirsahebmiya Hamirmiya Saiyad has been shown. Neither in the list nor in the plaint it has been averred that the original agreement executed by deceased Mirsahebmiya has already been given to the respondents and that is in custody of the respondents nor

it is mentioned in the plaint that the agreement to sell is in possession of the other side nor it is mentioned in the list itself that the original document is with the other side. As it is not averred in the plaint itself that the document is with the other side nor any endorsement has been made that the original agreement to sell is not with the plaintiff but with the other side. It is not mentioned in the plaint or in reply to the notice of the respondent that he will move the Court concerned at the appropriate time for production of original agreement to sell from the other side. Though in the plaint it is mentioned that it is a registered document. But it is orally stated before the Court that by mistake it was mentioned that the document was registered before the Sub-Registrar. The petitioner had examined his witness and the examination-in-chief of the witness is already over. The respondent no. 1 has alleged that the agreement to sell is fictitious document and it is required for cross-examination of the plaintiff's witness in respect of its execution as well as the contents of the receipt of money if any. The respondent no. 1 has moved an application for a direction to the plaintiff to produce original document itself shows that cross-examination of the witness should be continued. As such, though for production of that document, the respondent no.1 has given notice on 29-12-1997 under O. 11 R. 15 of the CPC to the plaintiff to make available the original agreement to sell for inspection. The plaintiff has not filed any reply to that notice. It was the appropriate time when the cross-examination of the witness was to be conducted at the relevant time with reference to its contents including the receipt of money. The respondents moved the application vide exh. 71 on 15-4-1999 for a direction to the plaintiff to produce the original agreement to sell.

7. I have carefully considered the submissions made by the learned counsel for the parties and perused the relevant material on record. It is no doubt that the petitioner has right to apply to the Court concerned to lead secondary evidence u/s 65 (a) of the Evidence Act when he is unable to produce the original document.

8. In the present case, the petitioner has neither filed original document nor applied for leading secondary evidence u/s 65 (a) of the Evidence Act. It was a proper stage when the respondents thought it fit to cross-examine the witness after production the original agreement to sell before the Court concerned. If the plaintiff - petitioner has not applied for secondary

evidence to be produced, it cannot be said that he can be allowed either at the end of the proceedings or after the result of the proceedings to produce secondary evidence. It was an appropriate time for the petitioner to move the Court concerned for leading secondary evidence in place of the original evidence u/s 65 (a) of the Evidence Act prior to examination of the witnesses by the plaintiff himself. As such, it cannot be said that right of the plaintiff to lead secondary evidence u/s 65 (a) of the Evidence Act has been affected by the impugned order, as the plaintiff has not availed of that opportunity before examination of the witnesses in the suit proceedings.

9. So far as the scheme provided by the Civil Procedure Code under O.11 R. 12, 13, and 14 of the CPC is concerned, it cannot be said that the possession of the document must be admitted by the party concerned and then the party should be directed to produce the same. If both the parties deny possession of the original document at the relevant time if any of the parties comes to the conclusion that the original document should be produced before the Court, the Court has to apply its mind to the facts and circumstances of the case and it has to record its findings as to which of the party is in possession of the original document. At that stage, the Court on the basis of the affidavits filed by the parties, the Court is required to pass appropriate order as to which of the party is in possession of that document and that document can be directed to be produced. Regarding the possession, the matter can only be decided on the basis of the affidavits as it is only incidental matter which is not required to be investigated and tried as a suit by leading the evidence. As such, the Court was fully justified in allowing the parties to file their affidavits and both the parties have denied the possession of the original document and the respondent no. 1 has applied for production of original document before the Court and the Court concerned is required to record a finding as to which of the party is in possession of that document and the Court is also required to direct the party to produce the original document after coming to the conclusion as to which of the party is in possession of the original document. If the plaintiff has substantial right to lead secondary evidence u/s 65 (a) of the Evidence Act, that should have been done by him at a proper stage and that opportunity if he has not availed of then it cannot be said that the substantial right has been curtailed by the procedural law by passing the order under O. 11 R. 14 of the CPC. On the basis of this, it cannot be said that the Court below has misconceived the application and

committed illegality or wrong and wrong interpretation has been made and the Court below has committed an error in rejecting the application of the plaintiff petitioner. The trial Court has come to the conclusion on the following points :

(i) That the plaintiff was aware that he has sent the original document to the defendants no. 5 and 7 as mentioned in para 4 of Civil Suit No. 1303 of 1992. No attempt has been made by the plaintiff to get the said document back except the notice given by the advocate of the plaintiff on 16-9-1999 first of all after 7 years.

(ii) That the respondent had already sent a notice dated 29-12-1997 for making available the original document for inspection. It was normal conduct of the plaintiff to react by giving suitable reply denying the possession of the document. The respondent has also filed the application exh. 71 for a direction to the plaintiff to produce the original document. During the pendency of that application, the plaintiff gave a notice to the respondents no. 5 to 11 for a direction to produce the original document.

That attempt has been made for the first time after lapse of about seven years. The agreement to sell is material evidence. It is unregistered document and if it has already been sent to the respondents no. 4 to 7 then there must be some attempt by the plaintiff petitioner to get it back. The agreement to sell is being material and relevant evidence on the basis of which the suit has been filed for specific performance of the contract and the contract is based on that very document i.e agreement to sell. Silence on the part of the plaintiff for a long time would be to react to draw inference that the original document is in his own possession.

(iii) The defendants no. 5 to 7 have preferred Civil Suit No .1303/92 and in that suit they have specifically pleaded and denied that the plaintiff has made payment of Rs.400000/- to

deceased Mirsahebmiya on 31-7-1980 on the date of execution of the document. They have also expressed surprise as to how such a huge amount is paid without obtaining any writing at the relevant point of time. That statement of fact has not been controverted or denied by the plaintiff in his reply exh. 29.

(iv) The evidence of the plaintiff is being recorded and the examination in chief of the plaintiff's witness has already been over and the cross-examination of the plaintiff was going on then, the application exh. 71 dated 15-4-1999 has been moved. But no attempt was made by the plaintiff to call for production of the document from the custody of the defendant no. 5 to 7 except serving the notice dated 16-9-1999. Long silence on the part of the plaintiff clearly indicates that the plaintiff is in possession of the original document agreement to sell and has failed to produce the same before the Court for the reasons best know to him.

10. Learned counsel Mr. Bhatt for the respondent no. 1 pointed out that the petitioner has suppressed material facts before this Court and at the relevant time when he obtained interim relief, he has not pointed out that this Court by the order dated 9-12-1998 has directed to consolidate, hear and decide five suits as expeditiously as possible and in any case not later than 30-6-1999. Had it been disclosed, this Court would not have passed the interim order staying the proceedings of the suits. The proceedings of five suits have been stayed as a result of the interim order passed by this Court. Only on this ground, the present revision application deserves to be dismissed.

11. From the facts stated above it reveals that the agreement to sell is said to have been executed by Mirsaheb Miyan in the year 1980 and it is stated that that the plaintiff has given an amount of Rs. 4 lacs in advance towards part consideration. The execution of said agreement is denied by the respondents and it is stated that the said agreement to sell is fictitious document. Though it is stated in para 4 of the plaint of Civil Suit No. 133 of 1992 that the document executed by Mirsaheb Miyan sent to the respondents was fictitious document. It may be that the said document was sent to the respondents but it does not appear to be true that the document was never taken back by the plaintiff from the respondents inasmuch as the suit has been filed for

specific performance of the contract. This document is the main evidence in this case and in absence of this document the suit cannot succeed. In the list of the documents filed along with the plaint this document is shown at serial no.1 but there is no endorsement that the original document is not in their possession. The plain allegation does not show that the original document has been given to the respondents, that the document has not been returned to them and the plaintiff will apply for production of that document from the respondents, at the relevant time. The respondent gave a notice dated 29-12-1997 to the plaintiff to produce the document for inspection. But no reply of that notice was sent to the respondents. Then the plaintiff applied on 29-12-1997 for production of that document when its production was considered necessary by the respondents for cross-examination as the examination-in chief of the witness was over, in respect of the contents of the document as well as the receipt of money as advance of Rs.4 lacs, then the plaintiff gave a notice to the respondents to produce the document when the application of the defendant for production of the document was pending. It may be that the document has some manipulation. Hence, the plaintiff remained silent for a period of more than 7 years and has made no efforts to get back the said document from the defendants, even it is presumed that the document was given to the defendants and got it taken back. That is the reason that the plaintiff is not producing the said document and the plaintiff has not applied for producing the secondary evidence u/s 65 of the Evidence Act before examination of the witness. when the application of the defendant for production of the document was pending.

12. I am constrained to hold that any party if it has not original evidence in possession can apply for leading secondary evidence at the stage at least prior to examination of the witness. Not during the examination of witness or after examination of witness. If any party has substantial right to produce secondary evidence it does not mean that it is liberty of that party to produce secondary evidence when he likes. The Court is within its jurisdiction to inquire summarily on the basis of affidavits as to which party is in possession of that document and to decide on the basis of the material on record. It is ancillary or incidental matter which is required to be decided summarily on the basis of the affidavits of the parties and other material on record. Law does not contemplate full-fledged inquiry regarding possession of document and decision after recording evidence of the parties in this respect.

13. The findings recorded by the Court below do not appear to be unreasonable or without jurisdiction. The impugned order passed by the Court below does not suffer from any infirmity, illegality, jurisdictional error or any material irregularity causing injustice to any party. Therefore, this revision application deserves to be dismissed.

14. I do not find any good reason calling for interference by this Court in revisional jurisdiction u/s 115 of the CPC. Accordingly, this revision application is dismissed. Rule is discharged with no order as to costs. Interim relief, if any, stands vacated.

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/JVSatwara/